Supreme Court, U.S.
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No. 02-1097

In The
# Supreme Court of the United States

FORD MOTOR COMPANY,

*Petitioner,*

v.

JUAN RAMON ROMO, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fifth Appellate District**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

The jury in this case found by clear and convincing evidence that Ford consciously disregarded human life in marketing a dangerously defective vehicle – the 1978 Bronco – which caused the deaths of three Californians and serious injuries to three others. The California Court of Appeal, after *de novo* review of the resulting punitive damage award, concluded that the award was not "grossly excessive" because: 1) Ford was guilty of "grossly reprehensible" conduct equivalent to "involuntary manslaughter;" 2) the actual and potential harm of Ford's conduct included three deaths and the potential for thousands of other deaths; and 3) Ford had ample notice under California law that conduct disregarding human life could result in serious punishment, including imprisonment.

### The 1978 Ford Bronco

The 1978 Bronco is an unstable sport utility vehicle Ford marketed for American families with a roof that is two-thirds plastic/one-third steel and has no roll bar. Ford knew before selling the 1978 Bronco that its roof would "fail" to protect its occupants in a rollover – just as it did here. Automotive experts called the Bronco a "piece of junk" and the "absolute" "worst" vehicle ever in a rollover.[1] As Ford formally admitted, never in its entire history had Ford built a hardtop vehicle without steel in the vehicle's rearmost roof pillar (the "D" pillar) to protect passengers. The extreme danger of the Bronco was shown by statistics Ford itself compiled for this trial which revealed that once the 1978 Bronco rolls over, it kills more occupants per rollover – *than any other SUV*.[2]

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[1] RT 2748:20-2750:16; 2757:14-2758:13; 3380:22-3382:1; 3524:3-26; 5013:19-5016:3; 5025:9-5028:17; 2669:13-18.

[2] Exhibits 204.5; 229.37; RT 4922:11-4933:14.

Well before marketing the 1978 Bronco, Ford had acquired extensive knowledge of rollover and roof crush hazards from testing, research, and safety engineering evaluations it conducted during the 1960s and 1970s. But in the mid-1970s, when the "large SUV" market suddenly took off, Ford saw it had no "entry" in that market and would have none until 1980. Ford's very top management reactivated and "expedited" a once-shelved "stop gap" 1978 Bronco (to exist but 2 years) knowingly sacrificing roof safety in the rush. Henry Ford II personally cut $9 million from the vehicle's production budget, and despite its own safety engineering "consensus" on roof crush and occupant safety, Ford deleted the "integral" roll bar from the original one-third steel roof design, and omitted steel reinforcement in the plastic rear two-thirds of the roof.

Despite deleting the "integral" roll bar, Ford left a deceptive empty "hump" in the steel part of the roof to make it "appear" as if a "roll over bar" were inside. Ford then advertised the vehicle for "family" use, promoting it as "Ford Tough."

A Ford *post*-production test on the 1978 Bronco showed the "roof crush problem," but Ford only addressed the "problem" in the planned, tested and unrushed 1980 Bronco by putting steel in the plastic roof's "D" pillar, thereby cutting rollover deaths by 60%. Ford did nothing about the hazards it knew existed in the 1978 Bronco.

## The Accident

In the summer of 1992, Ramon Romo bought a 1978 Ford Bronco because he thought it was "a strong, safe car" that was "ideal for the family to ride in." About a year later, on June 20, 1993, Juan Romo, Ramon's eldest son, was driving the 1978 Bronco just south of Modesto, California, on a straight interstate freeway. Juan was traveling the speed limit. The entire family was in the car: Juan's father, Ramon, was in the front passenger seat; Juan's mother, Salustia, and his brother, Ramiro, were in the backseat; and Juan's younger sisters, Evangelina and Maria, were sleeping in the rear of the vehicle.

Juan had been driving for a couple of hours when the family's Bronco approached a slow-moving truck which unexpectedly moved into the Romos' lane. Juan avoided a collision, but because of the Bronco's lack of stability (made worse merely by the presence of multiple occupants), the Bronco swerved across the roadway, and at less than 50 miles per hour started to roll. As the Bronco rolled (2 and ½ times), the roof's two-thirds rear plastic section broke off completely at the roof pillars and invaded the occupant compartment, and the front steel portion flattened to the dashboard.[3]

When the plastic portion of the roof (weighing more than 100 pounds) broke off, it inflicted massive head trauma to Juan's mother and his brother as they sat seat-belted upright in the rear seat. When the front part of the roof flattened, it crushed Juan's father's head as he sat seat-belted upright in the front seat. All three were properly seat-belted. All three died at the scene.

Expert testimony showed that if Ford had put steel reinforcement in the roof (as it later did in the 1980 model Bronco) to maintain "adequate survival space" and to keep the plastic section of the roof from breaking off, the three seat-belted decedents would have "walked away" from this accident.[4]

Juan survived only because as the Bronco rolled, he fell to his side below the crushing roof. Evangelina and Maria survived because they were lying asleep below the breaking rear plastic roof. Juan, Eva, and Maria not only suffered their own injuries, they witnessed their parents' and brother's gruesome deaths.

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[3] A photograph of the Bronco after the accident is in the Appendix.

[4] RT 3633:14-25; 3671:28-3672:10; 3615:11-3616:4.

## The Trial

The trial lasted four months. Before trial, Ford declined to exercise its statutory right to a trial "bifurcated" into liability and punitive damage phases. Instead, Ford chose a single-phase trial requiring plaintiffs to prove a *prima facie* case of "malice" before presenting any evidence of Ford's "financial condition." *See* Cal. Civ. Code, § 3295(a).

Also, Ford filed a motion *in limine* to exclude evidence of its "total net worth." CT 177-186. That motion was denied. Contrary to Ford's representation, Cert. Pet., at 3, n. 1, that motion only concerned Ford's "net worth" – nothing else. *Id.* Ford emphasized that the motion did *not* seek to exclude evidence of "profits" from the 1978-79 Bronco when Ford told the trial judge, "[n]othing was ever mentioned" in the *in limine* motion about "profit" relating to the vehicle. RT 5648:27-5649-18.

Evidence of Ford's "malice" showed that before marketing the Bronco:

- Ford knew that hundreds of thousands of rollovers occur each year causing thousands of deaths.
- Ford knew that in those rollovers weak roofs would "penalize" (kill) seat-belted passengers (who remain upright).
- Ford knew from rollover tests and "drop" tests that strong roofs and roll bars preserve occupant space and protect passengers in rollover accidents.
- Ford knew that utility vehicles in particular required strong roofs and "roll bars" to protect occupants because those vehicles rolled over more than other passenger vehicles.
- Ford knew that the 1978 Bronco with its high center of gravity (made higher with occupants) would roll over more than other passenger vehicles.

Yet, despite such knowledge, Ford provided *no rollover protection for occupants in this vehicle.* Instead, disregarding safety:

- Ford violated its own internal engineering "consensus" that plastic should not be used as an occupant enclosure by using unreinforced plastic for a roof with no steel in the Bronco's "D" pillar, saving $10 to $12 per vehicle.
- Ford violated another internal engineering "consensus" that SUVs needed roll bars to protect occupants from rollover injuries and deaths by "deleting" the steel "integral roll bar" in the Bronco's "B" pillar.
- Ford left a deceptive "hump" in the roof that was designed to enclose the "integral roll bar" giving the false "appearance" that a roll bar was inside.
- Ford performed no pre-production roof crush tests and no rollover stability tests for the 1978 Bronco.
- Ford failed to make the Bronco safe while "rushing" it to market to obtain market share.
- Ford knowingly failed to make the Bronco safe while Henry Ford II and Lee Iacocca implemented a corporate policy of "misleading" the government about rollover and roof crush safety hazards in order to avoid federal safety regulations aimed at saving lives.

That Ford knew the Bronco would cause deaths was also made clear by the admissions at trial of Al Darold, Ford's designated corporate representative, that Ford knew the 1978 Bronco's "plastic roof was not designed to witnstand rollover forces," and Ford did not expect this plastic roof top to "survive a rollover accident." RT 6366:3-6367:28; 6578:25-6579:13.

During trial, plaintiffs offered a Ford document into evidence showing total 1978-79 Bronco sales and profits. Exhibit 133.10. When asked if it objected to the evidence, Ford replied: "No objection, Your Honor." RT 5395:19-27. When submitting jury instructions, Ford requested no instruction limiting or excluding evidence of "out-of-state" conduct, sales, or profits.

After five days of deliberations, the jury awarded $6,226,793 in compensatory damages and $290 million in punitive damages. The jury allocated 78% fault to Ford, 12% to the driver of the second vehicle, and 10% to

plaintiff Juan Romo. Judgment for $294,935,709.10 was entered against Ford.

In post-trial motions, Ford challenged the "malice" finding and the amount of the award, but claimed no error based on the admission of Bronco sales or "profits evidence," or plaintiffs' counsel's use of Bronco profits evidence in closing argument. A new trial motion was granted based on alleged juror misconduct but was denied on all other grounds.[5]

**The Appeal**

After reviewing the entire record, the Court of Appeal rejected Ford's challenge to the jury's "malice" finding, concluding that the evidence was sufficient to permit the jury to "clearly and convincingly conclude" that Ford "acted with malice" and that it was "frivolous" for Ford to contend that its conduct was not sufficiently "vile" or "loathsome" to support the punitive damage award. *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115, 1146 (2002).

The Court of Appeal then exercised *de novo* review of the punitive damage award as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Court thoroughly examined the record and found Ford's misconduct comparable to "involuntary manslaughter" and "grossly reprehensible." 99 Cal.App.4th

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[5] Ford tries to tarnish the verdict by repeating allegations of jury misconduct. Cert. Pet., at 5-6. But the Court of Appeal reversed the trial court's new trial order because "the record provides no basis to reject the normal presumption the jury followed the instructions." 99 Cal.App.4th at 1133. The Court said: "Despite defendant's consistent attempts to portray this as a case of jurors run amok, the misconduct in the present case does not begin to approach [misconduct required for reversal]." *Id.* at 1137. Moreover, Ford asserts no federal constitutional issues and does not seek certiorari based on its claims of jury misconduct. Indeed, the juror misconduct issue was entirely a question of state law and the Court of Appeal resolved this issue by finding no improprieties.

at 1148, 1150-1151. The Court then compared the "ratio" of the "actual harm" suffered by the Romos (and the compensability of that harm) to the punitive damage award. *Id.* at 1147-1148. On comparable penalties, the Court found that California provided ample "notice" that conduct, like that found here, could result in a substantial civil penalty or "imprisonment." *Id.* at 1152. The Court upheld the award under the United States Constitution and California law.

Contrary to Ford's representations, Cert. Pet., at 2, 3, 7 & 8, the Court of Appeal did not "reject" or even address a Ford challenge to the admission or use of "total" "national" 1978-79 Bronco profits because Ford *waived* the issue in the trial court and never pressed it in the Court of Appeal.

The California Supreme Court denied Ford's petition for review.

## REASONS FOR DENYING THE PETITION

### I. CERTIORARI IS UNJUSTIFIED BECAUSE THE COURT OF APPEAL PROPERLY ENGAGED IN *DE NOVO* REVIEW IN CONCLUDING THAT THE PUNITIVE DAMAGE AWARD WAS NOT GROSSLY EXCESSIVE

In *Cooper Industries, Inc.*, this Court held that "courts of appeals should apply [a] *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards." 532 U.S. at 436. The California Court of Appeal expressly applied this decision and engaged in exactly the *de novo* review this Court required. 99 Cal.App.4th at 1149. The Court carefully examined the record and followed the test prescribed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in concluding that the punitive damage award was constitutional.

First, the Court of Appeal found that "the defendant's conduct was grossly reprehensible." 99 Cal.App.4th at 1150. "Unlike BMW, where the defendant's conduct was

not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case." *Id.* at 1150-1151. And, unlike any other case decided by this Court, this case has "the aggravating factors associated with particularly reprehensible conduct" which risked lives and caused deaths. *Id.* at 1151. Thus, the Court of Appeal properly concluded that "[i]n the present case, . . . the reprehensibility factor weighs heavily against a finding that the punitive damages award is grossly excessive." *Id.* at 1151.

Second, the Court of Appeal noted "a great disparity" between the compensatory and the punitive damages award. But the Court found that when compared to the "obvious and severe" actual harm – multiple deaths, the ratio between the harm and the award was not constitutionally excessive because under California law, the "wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.* at 1151.

Third, the Court of Appeal evaluated comparable civil and criminal penalties. *Id.* at 1151-52. The Court looked to criminal penalties and not just civil fines, because the Court found that Ford had engaged in conduct amounting to "involuntary manslaughter." *Id.* at 1148. "Such a comparison [only to civil fines] is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." *Id.* at 1151. Thus, the Court of Appeal explicitly engaged in *de novo* review and concluded that the punitive damage award was not grossly excessive.

Ford wrongly argues the Court of Appeal gave "conclusive weight" to the jury's fact-finding in conducting its *de novo* review. Cert. Pet., at 26-30. But the Court appropriately applied well-settled California law requiring that a jury's fact-finding must be upheld if supported by substantial evidence. 99 Cal.App.4th at 1137. The Court then properly assessed *de novo* the constitutional

implications of those underlying facts under each *BMW* guidepost. *Id.* at 1150-52.

Ford's argument confuses two distinct questions: 1) What is the appropriate appellate review of the jury's fact-finding; and 2) what is the appropriate appellate review of the determination of whether a punitive damage award is unconstitutionally excessive? Under *Cooper Industries,* the latter is a standard of *de novo* review, but the former is entirely a matter of state law and deference to the jury is appropriate. This Court stated in *Cooper Industries*: "Although the jury's application of [punitive damage] factors may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing punitive damages award, to disregard such jury findings." 532 U.S. at 440 n. 12. And, "[w]hile we have determined that the Court of Appeals must review the application of the *Gore* test *de novo*, it of course remains true that the Court of Appeals should defer to District Court's findings of fact unless they are clearly erroneous." 532 U.S. at 440 n. 14; *see also Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002) ("degree of reprehensibility" ultimately involves a legal conclusion, but "we must accept the underlying facts as found by the jury.") Here, the California Court of Appeal correctly applied the appropriate "constitutional standard to the facts of [this] particular case." *Cooper Industries*, 532 U.S. at 435.

Ford's argument also incorrectly assumes that the standard of appellate review of a state court jury's fact-finding is governed by federal constitutional law. But the Seventh Amendment, which governs the relationship of courts of appeals and juries in federal court, has never been applied to the states. *See* e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211 (1916). *Cooper Industries* prescribes *de novo* review of whether the amount of punitive damages is grossly excessive and a violation of due process, but that decision does not, and cannot prescribe the appropriate standard for appellate review of a jury's fact-finding. Review of jury fact-finding

is not an issue of federal constitutional law; it is entirely a matter of state law and differing approaches are permissible and an inevitable part of "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In fact, the Court in following California law, used a more exacting "substantial evidence" standard for reviewing the jury's fact-findings than this Court has prescribed under the Seventh Amendment for federal juries.

Ford also wrongly argues that *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), hold that a court of appeals must independently review findings of fact. But these decisions said that the absence of appellate review of punitive damage awards violated due process. *Exxon Valdez*, 270 F.3d at 1239; and *see Honda v. Oberg*, 512 U.S. at 429. These decisions do not hold that there should be *de novo* review of a jury's fact-finding.

Ford is incorrect in its contention that California has provided no "meaningful guidance" to juries, Cert. Pet., at 29, because California law long has been virtually identical to the *BMW* guideposts. Moreover, this Court has provided the clear guidance as to the Constitution's requirements in *BMW* and *Cooper Industries* which were followed in this case.

The key error in Ford's argument on the standard for appellate review of the jury's fact finding – and the key flaw throughout its Petition for Certiorari – is its failure to give any deference to the jury's determinations. Ford's approach would require not only that appellate courts engage in *de novo* review of whether a punitive damage award is grossly excessive, but also essentially a new *de novo* standard of review of the facts. Deference to the jury would be eliminated and the ability of states to define the role for juries in their legal systems would be negated. Every punitive damage case in every court in the country would end up being micromanaged by this Court as defendants will always challenge jury fact-finding. Nothing in *Cooper Industries*, or any decision of this Court, has ever suggested such an approach.

## II. BECAUSE THE COURT OF APPEAL APPLIED THE TEST PRESCRIBED BY THIS COURT, AND SINCE THE DAMAGES AWARDED IN THIS CASE ARE PERMISSIBLE UNDER THIS TEST, THERE IS NO BASIS FOR A GRANT OF CERTIORARI

Contrary to Ford's arguments, the Court of Appeal appropriately determined that the award was not "grossly excessive" under each of the "guideposts" identified in *BMW*, including a *de novo* assessment of: 1) the "degree of reprehensibility" of the conduct; 2) the "harm or potential harm suffered" and the award; and 3) comparable "civil or criminal penalties." 517 U.S. at 574-83.

### A. The Court of Appeal Appropriately Found That Ford's Conduct Was "Grossly Reprehensible"

In *BMW*, this Court described the "degree of reprehensibility" as "[p]erhaps the most important indicium" of excessiveness. 517 U.S. at 575. This is because exemplary damages should reflect "the enormity of [the defendant's] offense." *Id.*

After a lengthy evaluation of the record, the Court of Appeal on *de novo* review unanimously concluded that the "reprehensibility factor weighs heavily against" a finding that the award was "grossly excessive," because unlike *BMW*, Ford's conduct here *included* "aggravating factors" associated with "particularly reprehensible conduct," evincing "indifference to or reckless disregard for the health and safety of others." *Romo,* 99 Cal.App.4th at 1150-1151; and *BMW*, 517 U.S. at 576. The Court found Ford had mass marketed this "dangerous vehicle purely for [its] economic betterment," placing "tens of thousands of lives at risk" and actually claiming "three such lives." 99 Cal.App.4th at 1151.

Also, the Court flatly "disagree[d]" with Ford's contention that its conduct "'was at the very lowest end of the reprehensibility spectrum,'" finding that Ford

"willfully and consciously ignored the dangers to human life inherent in the 1978 Ford Bronco as designed, resulting in the deaths of three persons." *Id.* at 1148. The Court found that such corporate misconduct can constitute "involuntary manslaughter" and that "viewed in the context of a mass-produced vehicle sold to the public, certainly is seriously reprehensible conduct." *Id.*

Despite these findings, Ford argues that the Court of Appeal did not properly find Ford's conduct to be "grossly reprehensible" because Ford says: 1) it acted "reasonably" compared to other manufacturers; 2) it complied with Federal Motor Vehicle Safety Standards (FMVSS); 3) it did a "standard menu" of tests on the Bronco; 4) "paid experts" merely "disagreed" whether Ford was malicious; and 5) there had been no other Bronco lawsuits. Cert. Pet., at 6, 10-14. But these claims were made to the jury, which rejected them, as did the Court of Appeal. 99 Cal.App.4th at 1143, 1148, 1150.

The task for this Court, of course, is not to review the record and decide the facts for itself. Instead, the question is whether the Court of Appeal engaged in an appropriate review of the record in determining whether the award was "grossly excessive" relative to the degree of reprehensibility of Ford's conduct. *Cooper Industries,* 532 U.S. at 440. The Court of Appeal engaged in that *de novo* review. Further, the Court of Appeal also thoroughly examined the "entire record" in rejecting Ford's claims that its conduct was reasonable. 99 Cal.App.4th at 1143-47.

First, the Court rejected the argument that the 1978 Bronco was "comparable" to other SUV designs of that era, Cert. Pet., at 3, 10, because the record showed that Ford omitted roll bars from the Bronco even though it knew the 1976 Chevy Blazer, the vehicle Ford basically copied in creating the Bronco, had roll bars for both the steel "B"

pillars and plastic "D" pillars.[6] Thus, the Court found Ford's "decision to put the unreinforced fiberglass roof was despicable" because defendant knew "the competitor's removable fiberglass roof did contain metal reinforcement," *Id.* at 1145, and that because of Ford's knowledge of the Bronco's rollover and roof crush hazards it "avails defendant nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles." *Id.* at 1148.

Second, the Court of Appeal rejected Ford's alleged compliance with federal safety standards in effect "years after the design and production of the 1978 Bronco" because it "did not reflect the corporate state of mind prevailing at the time in question." *Id.* at 1143-1144. Ford knew the Bronco's roof would fail *before* it sold the vehicle.[7]

Ford also wrongly asserts that compliance with federal regulations precludes a finding of "malice." Cert. Pet., at 13. Courts are unanimous that it does not. *See Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059, n. 21 (11th Cir. 1994) (declining to hold that compliance with federal regulations "precludes a finding of wantonness"); and *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656-57, n. 6 (5th Cir. 1981) (alleged compliance with inapplicable

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[6] RT 2289:21-2291:15; Exhibit 230.82; RT 2500:28-2503:26; 2519:19-2521:2; 7046:26-7048:10; Exhibit 302.564, pp. 3-1-1, 3-2-1, 3-3-1.

[7] Further, Ford's alleged "compliance" was meaningless because no federal roof strength regulations applied to the Bronco in 1978 and the federal roof crush test does not test the plastic roof's "real world" vulnerability to *breaking* on impact. Exhibit 1056; RT 2211:9-2214:17; 2217:2-22; 2403:22-2404:1; 3525:23-3526:11. Also, Ford did not "comply" in good faith with federal standards because before producing the Bronco, Ford fraudulently "misled" the National Highway Traffic Safety Administration (NHTSA) about rollover and roof crush hazards to avoid the enactment of those safety regulations. RT 3247:16-3252:17; RT 3258:21-3259:7; 3386:2-3387:1; Exhibit 302.241, p. 2; RT 3519:12-3521:11. Moreover, Ford did not even comply with its *own* internal engineering "consensus" against using plastic for occupant enclosures, and in favor of requiring roll bars on utility vehicles.

federal safety standards did not bar punitive damages). Similarly, the cases cited by Ford on "industry custom" hold that such evidence is relevant but does not bar a malice finding. Cert. Pet., at 14.

Third, Ford did no pre-production roof crush or "stability" tests.[8]

Fourth, Ford's experts may have "disagreed" as to whether Ford was guilty of malice, but based on largely uncontradicted evidence (including in-court admissions of Ford's representative, Al Darold, and its ex-Vice President, and its own documents), the jury found malice, and the Court of Appeal affirmed. Cases cited by Ford on this issue, Cert. Pet., at 12-13, do not apply because the evidence in those cases was legally insufficient to sustain a malice finding.

Fifth, plaintiffs presented no evidence of other Bronco lawsuits by choice, not because none existed. Ford's *pre*-production malice is unaffected by this fact.

Thus, the Court of Appeal did not hold that "mere awareness" of a product's "potential risk of injury (no matter how small) suffices to establish gross reprehensibility," notwithstanding "compliance" with government and industry standards, and Ford's "good faith belief," Cert. Pet., at 8, but recognized that Ford intentionally marketed a product against its own internal engineers' "consensus," without

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[8] Ford says that it ran its "entire 'standard menu' of tests" on the Bronco. Cert. Pet., at 27, n. 13. But the evidence showed that Ford performed *no pre-production roof crush tests* at all (RT 2324:4-2325:17; 2401:26-2402:1; 2796:8-2797:23; 5905:24-5909:22; 6301:12-24; 6302:18-6303:11; 6441:24-6442:8), and only performed routine driving tests and *none of the tests* Ford told NHTSA in 1973 would properly test vehicle stability (Exhibit 301.898, Appendix C, p. 5; RT 2324:4-15; 5906:2-5907:7; 6294:5-6301:24).

Also, Ford's failure to test was unreasonable because Chevrolet had conducted pre-production rollover and roof crush tests on its 1976 Blazer (RT 2205:27-2208:13; 2228:27-2229:25), and these kinds of tests "should have been done" on the Bronco (RT 3376:8-3377:3).

rollover safety testing, and with design defects that it knew would kill.

Ford also contends that this Court should grant review to protect manufacturers from punitive damage awards. Cert. Pet., at 14. Ford argues: "To say, as the court did here, that a manufacturer, to make a profit, marketed a product that 'could kill people,' simply begs the question of reprehensibility." *Id.* at 14. But once more, this case is not about a product that "could kill people"; it is about three people who died in a product that Ford *knew* could kill people. As the Court of Appeal stated:

> "[W]e think it obvious that putting on the market a motor vehicle with a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously deciding not to provide adequate crash protection to properly belted passengers (in the words of a corporate memo introduced into evidence, 'penalizing' passengers for wearing a seatbelt) constitutes despicable conduct. Such conduct could kill people." 99 Cal.App.4th at 1141.

Ford also says that without review, a *per se* reprehensibility rule will subject every manufacturer "to huge punitive damage awards every time a jury, in hindsight, finds a product to be defective." Cert. Pet., at 10, 14. But the jury not only found this product defective, they found Ford guilty of "malice" which the Court of Appeal found "grossly reprehensible." There is no basis for Ford's apocalyptic prediction that without this Court's review every manufacturer would face huge punitive damage verdicts whenever there is a defective product.

### B. The Court of Appeal Appropriately Found that the Ratio Between the Punitive and Compensatory Damages Did Not Show that the Award Was Excessive

Ford argues that the ratio "is unconstitutional on its face." Cert. Pet., at 16. But this Court has maintained that there is no *per se* or facial unconstitutionality, consistently

rejecting a constitutional "bright line," marked by a "simple mathematical formula." *BMW*, 517 U.S. at 582; and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

In fact, the 50 to 1 ratio here is less than that already approved in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).[9] In *TXO*, this Court upheld a punitive damage award that was "526 times greater than the actual damages awarded by the jury," 509 U.S. at 453, concluding "we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." *Id.* at 462. This Court stressed that in appraising the reasonableness of the ratio, it is appropriate to consider the magnitude of "the *potential harm* that the defendant's conduct" may cause to the plaintiff and "other victims." *Id.* at 460. Here, the Court of Appeal recognized that Ford's conduct "placed tens of thousands of lives at risk" and actually claimed "three such lives." 99 Cal.App.4th at 1151. Indeed, Ford's conduct could have killed all six in the Romo family. Such misconduct supports a higher ratio.

Further, this Court has stated that the "ratio" guidepost requires an assessment of the punitive damage award's ratio to the "harm" inflicted on the plaintiff. *BMW*, 517 U.S. at 580. And "[h]igher ratios" may be justified where "a particularly egregious act has resulted in only a small amount of economic damages," or where "the monetary value of noneconomic harm might have been difficult to determine." 517 U.S. at 582.

Here, the Court of Appeal not only found Ford guilty of particularly "egregious" conduct, the Court recognized

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[9] Ford says the ratio is 63 to 1. Cert. Pet., at 8, 16. But in the courts below Ford stated the ratio is "48 to 1," and "less than 50 to 1." Plaintiffs agree with Ford's earlier ratio assessment based on a comparison of the $290 million punitive damage award to the total compensatory damages of $5,757,160.00 (after remittitur) awarded by the jury (a 50.4 to 1 ratio). CT 1481-1482; 3435-3437. Regardless, plaintiffs believe the ratio analysis is unaffected by the use of either the higher or lower ratio number.

that California law "undervalues "non-economic" harm in death cases by permitting victims' estates to recover economic damages only. *Id.* at 1147. Thus, the Court found the purely mathematical ratio was not excessive because "wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.*[10]

In contrast, this Court has found lower ratios appropriate where "none of the aggravating factors associated with particularly reprehensible conduct are present," and the harm is "purely economic in nature." *BMW*, 571 U.S. at 576. Cases cited by Ford follow this reasoning. Cert. Pet., at 16. *See FDIC v. Hamilton*, 122 F.3d 854, 861-62 (10th Cir. 1997) ("an economic injury case," where the reprehensibility factor "militates against punitive damages"); and *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) ("economic damage" case where the conduct was not reprehensible).

Also, in the years since *BMW* was decided, there are many federal appellate decisions approving punitive damages with higher ratios. *See* e.g., *United States v. Big Enterprises*, 184 F.3d 924 (8th Cir. 1999) (100:1 ratio); *Johansen v. Combustion Engineering*, 170 F.3d 1320 (11th Cir. 1999) (90:1 ratio); *Deters v. Equifax Credit Information Services*, 202 F.3d 1262, 1272 (10th Cir. 2000) (59:1 ratio). This belies Ford's claim that there is a bright line rule of facial unconstitutionality for punitive damage awards and that the award here breaches that purported rule.

### C. The Court of Appeal Appropriately Considered Other Sanctions for Ford's Conduct

Contrary to Ford's argument, the Court of Appeal did not "reject" the comparable penalties guidepost but appropriately concluded that Ford had fair notice of the

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[10] Here, the "actual harm" done included extreme harm – death, but the compensatory awards, pursuant to California law for that harm were nominal: father – $5,000; mother – $5,000; and brother – $0.

potential award based on comparable civil and criminal penalties. 99 Cal.App.4th at 1151-1152.

In *BMW*, this Court required that the punitive damage award be compared to either "the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The Court of Appeal considered both.

First, the Court of Appeal recognized the obvious: "comparison with civil fines . . . is inappropriate when the malicious conduct could result in imprisonment if committed by an individual instead of a corporation." 99 Cal.App.4th at 1151. That conclusion is consistent with this Court's decision in *Haslip* upholding a punitive damage "much in excess of the fine" that could have been imposed, because "[i]mprisonment" could have been required "in the criminal context." 499 U.S. at 23.

As Ford itself recognizes, many courts have come to this same common sense conclusion: comparison cannot be restricted to civil fines in a case where the conduct rises to the level of criminal culpability. The Tenth Circuit stated: "[Although] a punitive damage award [may be] exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award." *Bielicki v. Terminix International Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000). None of the cases cited by Ford hold to the contrary. Cert. Pet., at 19. In fact, in *In re Exxon Valdez*, 236 F.Supp.2d 1043 (D. Alaska 2002), cited by Ford, the District Court found that "provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the *BMW* analysis, justifies a punitive damages award "'much in excess of the fine that could be imposed.'" *Id.* at 1067. There is no conflict among the circuits or state courts on this issue.

Second, the Court of Appeal also considered the civil penalties that "could" be imposed, finding that Ford has been on "notice" that California has "for more than a century" imposed civil penalties related to the defendant's wealth, and that "since at least 1971" California has

upheld punitive damage awards amounting to a week's "profits," and "1 percent of net wealth." 99 Cal.App.4th at 1152. The Court found that these well-established penalty parameters provided Ford with "adequate notice of the potential for the punitive damages awarded in this case." *Id.*

### D. The Court of Appeal's Consideration of Ford's Overall Wealth In Determining the Punitive Damage Award is Consistent with the Decisions of this Court and Every Court

Ford wrongly argues the Court of Appeal used Ford's overall wealth to "disregard" and "trump the *BMW* guideposts." Cert. Pet., at 19. The Court applied *BMW*'s guideposts, and also appropriately considered Ford's "financial condition" as an additional factor in determining whether the award was excessive.

In *Haslip*, this Court found state standards which include consideration of a defendant's "financial position," impose "sufficiently definite and meaningful constraint" on a state's fact finders. 499 U.S. at 22. In *TXO*, this Court noted under "well-settled law" the defendant's "impressive net worth" may be considered. 509 U.S. at 462, n. 28. Then in *BMW*, this Court again accepted state guidelines requiring juries to consider the "financial position" of the defendant in awarding punitive damages. 517 U.S. at 566.

Courts take into account the defendant's worth because "an amount sufficient to punish or deter one individual may be trivial to another." *Zazu Designs v. L'Oreal SA*, 979 F.2d 499, 508 (7th Cir. 1992) (citation omitted). And, "wealth must remain relevant, because $50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996). Courts throughout the country have

upheld jury consideration of a defendant's wealth in imposing punitive damages.[11] Indeed, as the Court of Appeal recognized, "wealth" has been considered in assessing punitive damages in California for well over "a century." *Id.* at 1152.

Hence, the Court of Appeal appropriately considered Ford's wealth in determining that the award was not excessive as required by California law. *Id.* at 1149. And, citing *BMW*, the Court explicitly recognized that wealth alone could not justify the award:

> [T]he courts recognize that a defendant's wealth cannot be the sole criterion for the size of a punitive damage award: ability to pay cannot justify an *otherwise excessive* punitive damage award. *Romo,* 99 Cal.App.4th at 1152 (original emphasis).

Ford also argues that the Court of Appeal's ruling "demolishes" due process by "automatically" deeming "large corporations to have had 'fair notice' of virtually *any* monetary punishment" leaving wealthy defendants "bereft" of constitutional protection. Cert. Pet., at 21. Ford again mischaracterizes the Court's decision and its import. The Court did not "trump" *BMW*'s due process guidelines. It only considered Ford's financial condition in addition to thoroughly analyzing the award *de novo* in concluding the award was not constitutionally "excessive." Ford's rights were protected.

Ford also contends that "the relevant financial information, if any, is the monetary 'gain,' attributable to the defendant's wrongful conduct." Cert. Pet., at 22. Although this Court in *Haslip* has approved consideration of *both* "financial position," and the "profitability to the

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[11] *See* e.g., *Swinton v. Potomac Corp.,* 270 F.3d 794, 818 (9th Cir. 2001); *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996); *Black v. Iovino,* 219 Ill.App.3d 378, 394, 580 N.E.2d 139, 150 (1991); *Kirkbride v. Lisbon Contractors, Inc.,* 521 Pa. 97, 555 A.2d 800, 803 (1989); *Alaskan Village v. Smalley,* 720 P.2d 945 (Alaska 1986).

defendant of the wrongful conduct," there is no authority holding that either factor should be used to the exclusion of the other. 499 U.S. at 22. In fact, in *Haslip* and *TXO*, this Court upheld punitive damage awards that were vastly greater than the profits generated by the misconduct at issue.[12]

## III. BECAUSE DAMAGES WERE AWARDED BASED ON UNLAWFUL CONDUCT IN CALIFORNIA, THERE IS NO ISSUE WARRANTING A GRANT OF CERTIORARI CONCERNING THE CONSTITUTIONAL LIMITS ON A STATE'S POWER

Ford, in its second Question Presented, argues that the Court of Appeal "in conflict with *BMW* and *White v. Ford*" impermissibly allowed the jury verdict to "deprive petitioner of its total nationwide profits from sales of the product at issue." This argument is flawed because: 1) Ford waived its right to claim "extraterritorial" error based on "nationwide profits" on the Bronco; 2) no "out-of-state" conduct was punished here; and 3) the jury's

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[12] Ford also claims that its wrongful "gain" was $10 or $12 per vehicle. But this defective vehicle should *never have been on the road at all*. Ford had planned to wait until 1980 to introduce the "Big Bronco," but "reactivated" and "rushed" the "shelved" 1978-79 Bronco to market without rollover protection to capture lucrative market share. Ford's wrongful "gain" includes the entire economic benefit Ford obtained from marketing this vehicle when it did. Also, a new rule limiting financial condition to only one factor, i.e., remedial per unit cost, could negate the effectiveness of punitive damages to punish and deter.

Further, Ford's unprecedented proposal makes no sense because limiting punitive damages based on the cost of remedial measures alone could provide an inability to punish effective low-cost safety improvements. Moreover, it could punish efforts applying more costly, perhaps innovative, per unit improvements harshly. When safety *is* involved, rather than mere economic gain, such a myopic analysis would have limited value.

consideration of Bronco "profits" presents no constitutional issue.

### A. Ford waived its right to challenge the admission, use, and jury consideration of profits on the 1978-79 Bronco.

This Court has no jurisdiction to review the "profits" issue because the Court of Appeal did not address or pass upon a constitutional challenge by Ford to the admission or use of evidence of 1978-79 Bronco profits. Ford waived any challenge on this issue in the trial court, and never pressed it in the Court of Appeal.

In order to invoke this Court's jurisdiction, Ford must show that a federal question was either raised or decided in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Ford must show that they presented their federal claim with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 88-89 (1997). Whether a federal question was raised, is a matter of state procedural law. *Webb v. Webb*, 451 U.S. 493 (1981).

At trial, under California law, Ford waived any constitutional challenge to the admission and use of 1978-79 Bronco profits evidence because:

- Ford deliberately chose not to make a motion *in limine* to exclude or limit consideration of the evidence (explicitly telling the court the motion did not include Bronco "profit." RT 5648:27-5649:18).
- Ford acquiesced to the admission of the evidence.[13]
- Ford made no objection to counsel's closing argument referring to the evidence.[14]

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[13] Cal. Evid. Code, § 353; *People v. McPeters*, 2 Cal.4th 1148, 1188 (1992); *People v. Farnam*, 28 Cal.4th 107, 185 (2002).

[14] *People v. Bolden*, 29 Cal.4th 515, 526 (2002); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 797-798 (1981); *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d 841, 860 (1977).

- Ford chose not to request a jury instruction limiting the jury's consideration or use of the evidence, even though it had done so in other prior litigation.[15]

Here, unlike the defendants in *BMW v. Gore* and *Campbell v. State Farm*, 2001 WL 1246676 (Utah 2001), *cert. granted*, 70 U.S.L.W. 3580 (2002) (No. 01-1289), Ford made no motion *in limine* or objection to limit or exclude evidence of out-of-state conduct.[16] And unlike it did in the two years before the Romo trial, in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), and *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *petition for cert. filed,* 71 U.S.L.W. 3519 (U.S. Jan. 21, 2003), Ford did not submit its own pattern instruction limiting the jury's consideration of out-of-state conduct in this case. Thus, despite *repeated* opportunities, Ford waived its challenge to the admission, use and consideration of "extraterritorial" Bronco profits.

After trial, Ford made *no request* for a new trial based either on the admission of evidence of Bronco profits, or based on any "misconduct" of counsel in discussing that evidence in closing argument. Ford did, for the first time, make a brief passing reference to Bronco profits in its post-trial motion, reiterating its *in limine* argument that consideration of Ford's "net worth" was improper. But Ford could not seek a new trial based on the "erroneous" admission of Bronco profits evidence because such alleged error must have been "excepted to" during trial. Cal. Code of Civ. Proc., § 657(7). Having waited for an adverse verdict without raising the issue, Ford waived grounds for seeking a new trial based on the admission of Bronco

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[15] *Hilts v. County of Solano*, 265 Cal.App.2d 161, 171 (1961); *People v. Duran*, 140 Cal.App.3d 485, 493-494 (1983); *In re Conservatorship of Gregory*, 80 Cal.App.4th 514, 520-521 (2000).

[16] *See* e.g., *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1222 n. 17 (Alaska 1998) (noting that unlike BMW, GM made no motion *in limine,* or objection to closing argument regarding "extraterritorial sales" and waived the "extraterritoriality argument").

profit evidence.[17] Not objecting to plaintiffs' counsel's closing argument referring to Bronco profits, Ford waived grounds for a later challenge.[18] Then, in the Court of Appeal, Ford again only challenged admission of evidence of its "net worth," and made no constitutional challenge to the admission of Bronco profits evidence.[19]

Despite these facts, Ford falsely states that the Court of Appeal "rejected" Ford's argument that *BMW* precluded punishing Ford based on nationwide "profits" on the Bronco. Cert. Pet., at 2, 3, 7 & 8. The Court did not consider or dispose of the issue because Ford *never preserved or presented* the issue for the Court's review. Ford cannot present this claim now.

### B. No evidence shows that the jury punished out-of-state conduct.

Ford also raises no federalism issue because the jury did not punish out-of-state conduct. The jury punished Ford for killing three California citizens in the presence of their children and siblings and to deter similar future misconduct in that state.

In *BMW*, this Court applied principles of state sovereignty and comity to conclude that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *BMW*, 517 U.S. at 572. *BMW* involved a fraudulent sale in Alabama where the jury multiplied the number of paint-damaged cars sold nationally times the average damage to each car to make the punitive damage

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[17] *In re Da Rosa's Estate*, 82 Cal.App.2d 550, 556 (1947); *Baron v. Sanger Motor Sales*, 249 Cal.App.2d 846 (1967).

[18] *Warner Const. Co. v. City of Los Angeles*, 2 Cal.3d 285, 302-303 (1970); *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d at 860.

[19] *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987); *Adams v. Robertson*, 520 U.S. at 88-89; *People v. Ashmus*, 54 Cal.3d 932, 985, n. 15 (1991).

award. Because the award was based on sales outside Alabama, and because not disclosing similar minor paint damage was lawful in other States, this Court found the award violated federalism principles. *Id.* at 573-74.

This case involved deaths caused *in* California. There was no "other" out-of-state lawsuit evidence because plaintiffs presented none. The only evidence of harm caused by Ford's pre-production "malice" was the *Romo* accident, and the only victims of that malice, the *Romos*. Unlike *BMW*, there was no evidence of similar out-of-state misconduct, and therefore, the jury could not have punished Ford for such other bad acts. Also, unlike *Campbell v. State Farm*, there was no evidence of dissimilar multi-state bad faith acts in a national "scheme." 2001 WL 1246676, at *11-*12.

Further, unlike *White v. Ford*, there was no evidence of nationwide consumer complaints, a NHTSA investigation because of complaints, or a national recall letter campaign for more than 800,000 vehicles. *White*, 312 F.3d at 1003-1004, 1009. In *White*, Ford requested, but was refused, an instruction limiting the jury's consideration of this out-of-state evidence. *Id.* at 1013. Here, Ford requested no such instruction because there was no evidence of other out-of-state complaints or conduct.

Also, the *White* Court found Ford was punished for its "failure to warn" consumers across the country. *Id.* at 1019. But the jury rejected plaintiffs' failure to warn theory of liability in this case. CT 1477. Thus, the Romos' punitive damage award could not have been based on that alleged failure.[20]

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[20] Ford has consistently tried to portray the jury as inflamed with passion, prejudice, and "run amok," but this jury rationally decided the issues, including rejecting plaintiffs' failure to warn theory, finding plaintiff Juan Romo (10%) and a third party (12%) comparatively at

(Continued on following page)

Indeed, in *White*, Ford's "failure to warn" was "actually *lawful* in a number of other states." 312 F.3d at 1019 (italics in original). There is no such issue here. No state holds that maliciously marketing a defective product that kills is "lawful."

Still, Ford argues that the Court of Appeal considered "unlawful" out-of-state conduct citing a partial quotation from the opinion, stating: "the interests California seeks to protect – individual human lives – is neither unique to California nor limited to its own citizens." Cert. Pet., at 7. But the quotation continues: "any 1978 Bronco *operated on California highways* creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside." 99 Cal.App.4th at 1151, n. 3 (emphasis added). The Court *only* considered Ford's conduct as it affected California.[21]

### C. An award which includes consideration of "profit" from malicious conduct presents no constitutional issue and no basis for certiorari.

Even if Ford had preserved a challenge to the admission of evidence of Bronco profits, no constitutional violation exists because: 1) there is no denial of due

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fault, and choosing its own punitive damage figure contrary to what plaintiffs' counsel had suggested.

[21] Ford also cites an isolated reference in plaintiffs' counsel's closing argument about the need to "warn" a hypothetical mother "in Montana" to suggest the jury punished out-of-state conduct. Cert. Pet., at 25-26, and *see* RT 9998:22-9999:7. But there was no evidence of any harm in Montana in this case, and no request to punish Ford for any misconduct occurring in Montana, or any other state.

Further, even if the reference to Montana were to be construed as a request to hold Ford liable for failing to warn in that state, the Romos' punitive damage award could not have been based on such a warning failure because the jury rejected plaintiffs' failure to warn theory.

process in considering "total" profits obtained from the sale of a defective product; and 2) the jury did not "deprive" Ford of those profits.

Like "financial position," this Court has approved the "profitability" of the wrongful conduct as a factor the jury may consider in awarding punitive damages. *Haslip,* 499 U.S. at 22. Further, since out-of-state "conduct" may be considered on the "reprehensibility" issue, evidence of profits from that conduct likewise should be admissible for the same purpose. *BMW*, 517 U.S. at 574, n. 21.

A defendant's "financial condition" can be a complex issue. A jury must be permitted to consider different financial "factors" because reliance on just one factor may inaccurately reflect the defendant's true financial condition. For example, evidence that a defendant has little or no "net worth" on paper, may not accurately reflect the defendant's actual ability to pay.[22] Similarly, where a defendant makes "little profit" on a defective product in relation to its overall financial condition, "merely taking away that profit may or may not impose much punishment on the seller."[23] Hence, a jury must be permitted to consider any financial information which fairly reflects the defendant's overall "financial condition" or ability to pay.[24]

Under California law, once a plaintiff has established a *prima facie* case of liability for punitive damages, the plaintiff may present evidence of "[t]he profits the defendant has gained by virtue of the wrongful course of conduct", and "[t]he financial condition of the defendant." Cal. Civ. Code, § 3295(a). Thus, in closing argument, without objection, plaintiffs' counsel discussed Ford's

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[22] *See* e.g., *Zaxis Wireless Communications, Inc. v. Motor Sound Corporation*, 89 Cal.App.4th 577, 582-583 (2001).

[23] *See* e.g., *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 52-53 (Tex. 1998).

[24] *See* e.g., *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1659-1660 (1996).

"financial condition" *and* the huge profits and economic benefit Ford reaped from the sale of the 1978-79 Bronco. By the time of trial, Ford's profits on the Bronco had grown in value to more than $1.076 billion.[25]

In considering this "profit" evidence, the jury did not make an award based on a multiplier of Ford's national sales figures, like *BMW*, or a number disgorging Ford of "all" its ill-gotten gain ($1 billion or more).[26] Instead, the jury rationally chose *its own figure* which turned out to be roughly equivalent to 1.2% of Ford's net worth ($25 billion), nine days of after-tax profits ($20 million a day), a fraction of Ford's $14 billion in cash on hand, and a minor portion of Ford's total economic benefit from the Bronco. Profit was just one factor considered by the jury.

After considering the size of the award relative to all the appropriate financial factors, the Court of Appeal acknowledged the rational basis for the jury's verdict and "could not [itself] conclude that the level of damages was excessive." *Romo*, 99 Cal.App.4th at 1149.

Further, even if it were assumed that the jury's award and the Court of Appeal's analysis were based only upon evidence of Ford's total profits on the Bronco, which they *certainly* were not, there still would be no constitutional violation. Deducting the *Romo* verdict, Ford retained over $785 million of the $1.076 billion figure argued to the jury,

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[25] Plaintiffs' counsel used a 10% return on $160 million in profits Ford made on the 1978-79 Bronco to calculate a present value of $1.076 billion, despite the fact that Ford reported internal rates of return which often far exceeded 10%. RT 9585:19-9586:25; Exhibit 302.564a, p. 2.

This calculation did not include the huge economic benefit to Ford from the major "market share" it sought and captured when it "rushed" the "stop gap" Bronco into the explosively growing "family" SUV market.

[26] *See also Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Indiana 1999), *cert. denied*, 529 U.S. 1021 (2000), ($13.8 million award equal to 24% of total money saved nationally was held not to be excessive).

or more, from 1978-79 Bronco sales. Thus, there would remain ample room for other states to protect their interests.

Ford's concern that allowing the jury to consider profits from sales in other states "subjects the defendant to multiple and duplicative penalties on the basis of the same challenged design feature," Cert. Pet., at 25, is entirely premature and not presented here. Also, "multiplicity" is not an issue because a jury can always consider other awards in deciding the appropriate level of a punitive award to deter and punish.[27]

Finally, contrary to Ford's suggestion, there is no need to hold this case pending the decision in *Campbell v. State Farm*. Here, the jury imposed punitive damages for wrongful conduct, amounting to manslaughter, that occurred in California. No national conduct was punished. No jury instruction limiting consideration of national conduct was refused. Further, the reprehensibility was extreme, the harm – death – not "minor" economic harm, with ample notice to Ford of the potential penalty.

## CONCLUSION

In June 2003, 10 years will have passed since this horrible accident occurred. This case is unique *not* because it represents an aberration or injustice to Ford, or a threat to American manufacturers, but because it has taken this extraordinary case to finally punish Ford for keeping a known hazard hidden for so long. Outwardly indistinguishable from Broncos built from 1980 through 1996, no one before has obtained Ford's admission that for just two model years – 1978 and 1979 – it put a strong looking roof on a higher rollover risk vehicle that Ford

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[27] *See* e.g., *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d at 54; *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 812; *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th at 1660-1663.

knew would "fail" in a rollover accident. No one has ever shown that for the sake of pursuing its own huge economic gain, Ford left out safety features on the Bronco it knew were needed to protect the "family" occupants inside. Ford's misconduct cost three human lives and risked thousands more.

Under principles established by this Court, the California Court of Appeal appropriately determined that the amount of the punitive damage award was not unconstitutional. This Court's principles were not "eviscerated," "trumped," "conflicted," "rejected," or avoided by an "end run"; they were expressly followed. Ford's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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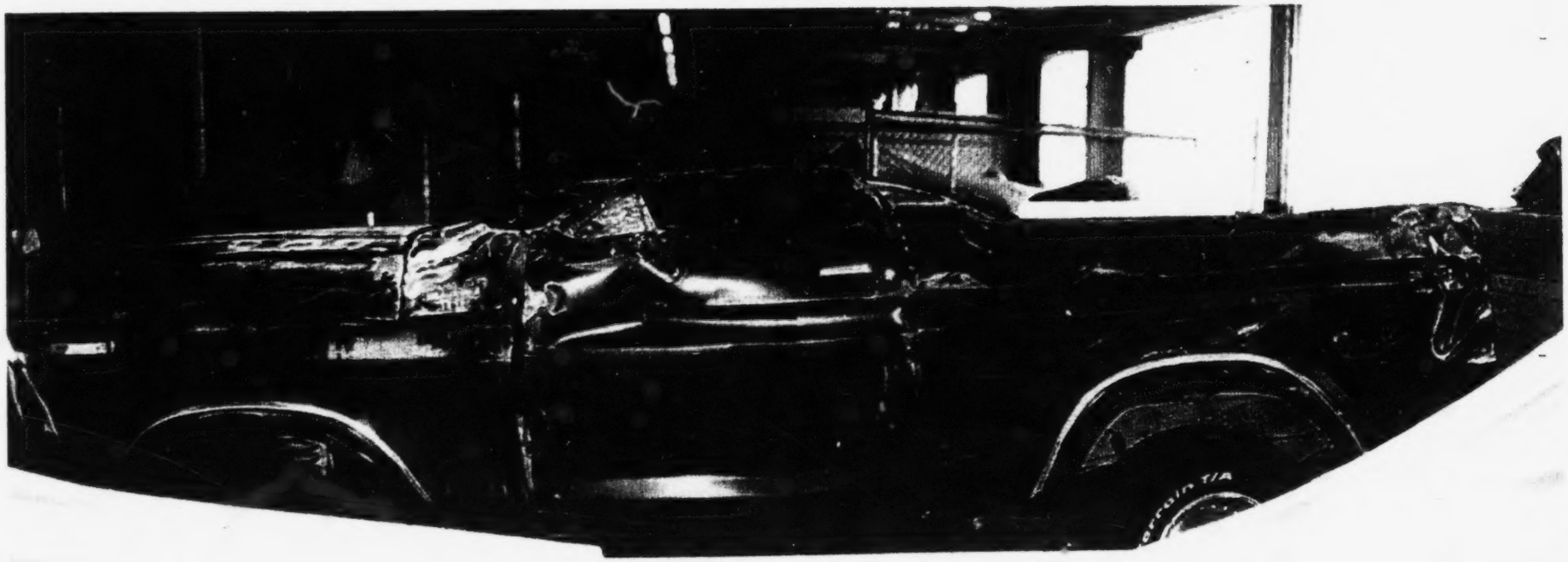

Exhibit 28.12